No. 00-1167 (21)

In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC.,
a California non-profit corporation
and membership organization, *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY,
a separate legal entity created pursuant
to Bi-State Compact, *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iii

PREFACE..... 1

STATEMENT OF THE CASE..... 2

SUMMARY OF ARGUMENT..... 11

I THE CONSTITUTION REQUIRES JUST COMPENSATION FOR *ALL* TAKINGS, REGARDLESS OF THEIR LENGTH OR THE MANNER OF THEIR INSTIGATION. THUS, THE ISSUE IS *NOT* WHETHER PROPERTY WAS TAKEN TEMPORARILY, BUT WHETHER IT WAS TAKEN AT ALL..... 13

A *All* Takings Require Compensation..... 15

B A Seizure Of The Right To Use Property – Even Temporarily – Requires Compensation..... 20

C *First English* Mandates Compensation For The Impacts Of Deliberate Planning Moratoria That – By Definition – Take The Right To Make Economically Productive Use Of Property. The Ninth Circuit Wholly Misunderstood That..... 24

II FROM A LANDOWNER'S POINT OF VIEW, GOVERNMENT IMPOSITION OF A FREEZE ON ALL ECONOMICALLY PRODUCTIVE USES, ALBEIT TEMPORARILY, IS THE EQUIVALENT OF A TEMPORARY CONDEMNATION OF SUCH LAND. IN EITHER EVENT, THE RIGHTFUL OWNER'S *USE* OF THE LAND HAS BEEN TAKEN, AND JUST COMPENSATION IS DUE..... 32

TABLE OF CONTENTS – Continued

Page

A "Eminent Domain" And "Police Power" Are Really Two Sides Of The Same Coin..... 33

B A "Police Power" Freeze On The Use Of Vacant Land And An "Eminent Domain" Taking Are Functionally – and Constitutionally – The Same..... 36

C Good Government Intentions Do Not Vitiate The Need For Compensation – In Fact, They Reinforce It..... 39

D TRPA's Conscious Decision To Prohibit The Use Of The Petitioners' Land Requires Compensation To Constitutionalize That Choice..... 44

E At A Minimum, Compensation Is Due From The Time A Moratorium Has A Substantial Adverse Impact On Landowners..... 46

CONCLUSION..... 49

TABLE OF AUTHORITIES

Page

CASES

A.A. Profiles v. City of Fort Lauderdale, 253 F.3d 576 (11th Cir. 2001) 17

Agins v. City of Tiburon, 24 Cal.3d 266 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980) 26, 36

American Tower, L.P. v. City of Grant, 621 N.W.2d 37 (Minn. App. 2001) 29

Armstrong v. United States, 364 U.S. 40 (1960) 34

Arverne Bay Construction Co. v. Thatcher, 278 N.Y.2d 222 (1938) 24

Bass Enters. Prod. Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998) 31

Berman v. Parker, 348 U.S. 26 (1954) 16, 34, 36

Boston Chamber of Commerce v. Boston, 217 U.S. 189 (1910) 10, 23

City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978) 36

City of Birmingham Planning Commn. v. Johnson Realty Co., Inc., 688 So. 2d 871 (Ala. App. 1997) 29

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) ..... *passim*

City of Oakland v. Oakland Raiders, 174 Cal.App.3d 414, 220 Cal. Rptr. 153 (1985) 35

Cohens v. Virginia, 6 Wheat. [17 U.S.] 264 (1821) ..11, 26

Corn v. City of Lauderdale Lakes, 95 F.3d 1066 (11th Cir. 1996) 25

TABLE OF AUTHORITIES – Continued

Page

Dames & Moore v. Regan, 453 U.S. 654 (1981) 12, 33, 41

Davis v. Newton Coal Co., 267 U.S. 292 (1925) 20

Dolan v. City of Tigard, 512 U.S. 374 (1994) 50

Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970) 34

Eastern Minerals Int'l, Inc. v. United States, 36 Fed. Cl. 541 (1996) 25

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) ..... *passim*

Fletcher v. Peck, 6 Cranch [10 U.S.] 87 (1810) 34

Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) 23, 31

Florida Rock Products, Inc. v. United States, 45 Fed. Cl. 21 (1999) 17, 40, 43

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 44

Griggs v. Allegheney County, 369 U.S. 84 (1962) 42

Gunthner v. Planning Board, 762 A.2d 710 (N.J.S. 2000) 29

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) 21, 35, 36

Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991) 16, 22, 27

Hughes v. Washington, 389 U.S. 290 (1967) 20

Hurley v. Kincaid, 285 U.S. 95 (1932) 34, 42

Jacobs v. United States, 290 U.S. 13 (1933) 36

TABLE OF AUTHORITIES – Continued

Page

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 12, 16, 23, 41

Keshbro, Inc. v. City of Miami, ___ So.2d ___, 2001 WL 776555 (Fla. 2001) 25

Kimball Laundry Co v. United States, 338 U.S. 1 (1949) 16, 21, 30

Kirby Forest Indus., Inc. v. United States, 467 U.S. 1 (1984) 15, 17, 21

Lake Country Estates v. Tahoe Reg. Plan. Agency, 440 U.S. 391 (1979) 1

Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990) 37

Lomarch Corp. v. Mayor of Englewood, 237 A.2d 881 (N.J. 1968) 25

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 11, 12, 15, 24, 40, 41

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) 12, 48

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ..... *passim*

Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992) 19

Lynch v. Household Fin. Co., 405 U.S. 538 (1972) 10

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 37

Marandino v. Planning & Zoning Commn., 573 A.2d 768 (Conn. App. 1990) 29

Nollan v. California Coastal Commn., 483 U.S. 825 (1987) 42, 44, 50

TABLE OF AUTHORITIES – Continued

Page

Palazzolo v. Rhode Island, ___ U.S. ___ (2001) 43

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 36

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 16, 39, 40

Pope v. De Poala, 574 N.Y.S.2d 869 (1991) 29

Preseault v. I.C.C., 494 U.S. 1 (1990) 12, 41

Pumpelly v. Green Bay Co., 13 Wall. [80 U.S.] 166 (1872) 16

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 12, 33, 34, 41

Richmond Elks Hall Assn. v. Richmond Redev. Agency, 561 F.2d 1327 (9th Cir. 1977) 36

Romesburg v. Fayette County Zoning Hearing Bd., 727 A.2d 150 (Penn. Comm. Ct. 1999) 29

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Suitum v. Tahoe Reg. Plan. Agency, 520 U.S. 725 (1997) 1, 44

United States v. Causby, 328 U.S. 256 (1946) ... 15, 16, 30

TABLE OF AUTHORITIES – Continued

Page

United States v. Clarke, 445 U.S. 253 (1980).....42, 47

United States v. Dickinson, 331 U.S. 745 (1947).....9, 16, 20

United States v. Dow, 357 U.S. 17 (1958).....30

United States v. General Motors Corp., 323 U.S. 373 (1945).....16, 21, 22, 30

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Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).....40

Yuba Goldfields, Inc. v. United States, 723 F.2d 884 (Fed. Cir. 1983).....20

Yuba Natural Resources, Inc. v. United States, 904 F.2d 1577 (Fed. Cir. 1990).....39

STATUTES

Cal. Gov. Code § 65858.....26

Cal. Gov. Code § 65950.....28

TABLE OF AUTHORITIES – Continued

Page

TEXTS

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Page

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PREFACE

Seventeen years ago, some 700 owners of individual, single-family lots in the Lake Tahoe Basin in California and Nevada filed suit, seeking redress for what had, until then, been a three year "temporary" ban on making any productive use of their land. They sued when that freeze mutated into a permanent taking of their land.[1]

Petitioners are not developers. They are individuals who purchased their lots in order to build homes on them – as was then permitted by prevailing zoning and land use regulations. Now, all they can do is look at and walk on "their" land (although the trial judge noted that, as written, TRPA's rules preclude at least some of these landowners from even walking on their own property without first getting a government permit [Pet. App., p. 73]). All other rights – except the "right" to pay taxes – have been *de facto* taken.

Thus, one point must be plainly stated up front: *the purported "temporary" planning "moratorium" was nothing of the sort; it never allowed any use and it never ended.*[2]

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[1] This Court examined the fate of one Lake Tahoe landowner in *Suitum v. Tahoe Reg. Plan. Agency* [TRPA], 520 U.S. 725 (1997), and may recall the utter prohibition on economically productive or beneficial use imposed on landowners in so-called "high hazard" areas under TRPA's 1987 Plan. For earlier litigation, see *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391 (1979), in which the Court (through Justice Stevens) held that TRPA could be liable for regulatory takings under 42 U.S.C. § 1983 if its land use policies were too restrictive.

[2] A moratorium is "an authorized delay in . . . development approval." (Dwight H. Merriam & Gurdon H. Buck, *Smart Growth, Dumb Takings*, 29 Environmental Law Rptr. 10746, 10756 [Dec. 1999] [noting that legitimate planning moratoria specifically identify their objectives, are as short as possible, and encourage reasonable interim use of the affected property in order to guard against invalidation or awards of compensation].)

Whatever else one may say about it – and the Court can expect the Tahoe Regional Planning Agency (TRPA) and its *amici curiae* to say a good deal – these landowners did not file suit until *after* the so-called "temporary" freeze had become permanent with the adoption of TRPA's 1984 Plan, leaving them with *no* allowable land uses since 1981. At that point, they sought compensation for both past and future takings of their right to use their homesites.

STATEMENT OF THE CASE

The Petitioners – some 400 owners of individual, lawfully subdivided, single-family residential lots around Lake Tahoe – are mostly married couples who bought their lots years ago for individual retirement, vacation, or permanent homes for themselves and their families.[3] The lots were all located in partially developed residential neighborhoods with paved roads, utility service, and homes built on many of the neighboring lots. All of the landowners bought their lots many years before the regulations challenged here were even being considered. Their expectation to use their land the same as their neighbors was thus as real as it was reasonable. (Compare *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 [1992] [taking occurred when new regulations prevented buyer of last two undeveloped lots in a subdivision from building].)

However, for the past two decades TRPA has prevented Petitioners from building their homes (or anything else) by a series of rolling prohibitions. There were four formal prohibitions, interspersed with informal ones to bridge some gaps, the upshot of which has been a total prohibition of any use since 1981.

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[3] The 700 original plaintiffs have seen their numbers eroded by the passage of time in this Dickensian litigation. Some have died. Others have simply become exhausted.

Lake Tahoe is a unique treasure. That, as the District Court observed, is why people want to build homes near it. (Pet. App., p. 65.) However, in the 1950s and 1960s, its trademark clarity began to lose its luster. Construction of infrastructure (e.g., roads and general grading) for local development was increasing the runoff of dirt and nutrients into the lake, thus increasing the growth of algae and clouding the water. (Pet. App., pp. 62-65.) The solution, curbing development, was obvious and, in 1969, California and Nevada (with the concurrence of Congress and the President) created TRPA to unify land use planning and control in the 501 square mile, bi-state, Lake Tahoe Basin. The problem which has brought this case here is not the regulatory ends, but rather the unconstitutional means employed by TRPA.

TRPA's early planning divided the land into different zones, depending on its steepness, geology, water absorption, etc. Four zones, zones 1 through 3 and SEZ (stream environment zone), were classed as "high hazard" areas, i.e., hazardous to the continued clarity of the lake, and development there was restricted, although not prohibited.

During the 1970s, the lake's clarity continued to deteriorate and the two states had differing views on how to govern the area. After much heated negotiation, the legislatures and governors of California and Nevada, as well as the Congress and President of the United States, agreed on amendments to the interstate compact that created TRPA. (JA 83 is the Compact as amended.)

The tripartite legislative negotiation that resulted in the new Tahoe Compact (effective Dec. 19, 1980) called for a slowdown of development, but not a halt, while TRPA was scheduled to spend the next 18 months devising environmental threshold carrying capacities for the

region and then another year amending its plan to maintain those capacities.[4] Although the Compact recites the necessity "to halt temporarily works of development in the region which might otherwise absorb the entire capacity of the region for further development or direct it out of harmony with the ultimate plan" (JA 105) during that planning period, it only imposed a cap on the number of residential permits that could be issued, not an outright ban on development. And the restriction hammered out in these legislative negotiations was quite specific. For 1980, 1981, and 1982, the Compact limited building permits in each of the cities and counties in the region to the number of building permits each of those entities had issued in 1978, and it listed the precise number allotted to each (JA 106).

But TRPA's first acts in early 1981 went beyond the legislatively negotiated building slowdown. Way beyond. Rather than implement that slowdown, it commanded a freeze. In Ordinance 81-5 (i.e., the fifth ordinance adopted in 1981, and one of the first matters actually considered) TRPA, under the guise of amending its Water Quality Plan, precluded virtually all development in zones 1, 2, 3, and SEZ (i.e., the land involved in this case). At the same time, TRPA candidly asked Congress and the legislatures of California and Nevada to appropriate funds to buy the affected land to alleviate the "hardship" it knew it was inflicting on landowners like those at bench, whose properties were thus *de facto* taken. (See JA 126.)

Ordinance 81-5 was not a "planning" or "time out" moratorium of the kind sometimes used by planning

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[4] In simpler terms, TRPA was to determine the kind and intensity of development that could be tolerated consistent with maintaining the region's significant scenic, recreational, and natural resource values.

agencies to provide needed breathing space.[5] Although dubbed "temporary," it was nothing of the sort; it was actually a substantive regulation, rather than a procedural, planning device, and it made a dramatic change in TRPA's land use plan. Where that plan originally viewed the land development zones in bulk (concluding, for example, that land coverage in zone 1 *throughout the basin* should total 1%), Ordinance 81-5 transferred that limitation to each lot in the area, prohibiting development of more than *1% of any individual lot* in zones 1 and 2, with 5% in zone 3 and zero in SEZ (see JA 169), rendering the lots unusable. One percent coverage on a typical 10,000 square foot lot in these subdivisions would yield only 100 square feet for development – barely a tool shed, surely not a home.

Thus, in reality, Ordinance 81-5 was the first in an unremitting series of consecutive, back-to-back prohibitions. Ostensibly, that initial moratorium was to remain in effect until TRPA adopted amendments to the Regional Plan. A year later, on Aug. 26, 1982, TRPA established environmental threshold carrying capacities which would

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[5] The American Planning Association has identified two bases for planning moratoria. The first is to aid the preparation of a comprehensive plan by precluding developers from obtaining permits that conflict with the plan being drafted. The other is to provide time to construct needed infrastructure. (APA, The Growing Smart Legislative Guidebook [2001] [reproduced in ALI-ABA, Land Use Institute Study Materials 133 [Aug. 16-18, 2001].) Neither describes what happened at bench. As a recent text explains:

> "The proper role of a moratorium is as a stopgap, temporary, emergency measure. . . . Moratoria measures, whatever the type, should not be used as growth control tools or regulatory measures in and of themselves." (Michael A. Zizka, et al., State & Local Government Land Use Liability § 4:4, p. 4-3 [rev. 2000].)

determine the maximum capacity for development of each lot in the area. The Compact required TRPA to complete its work on the Regional Plan within one year of that date. As time passed, TRPA recognized it would not meet that goal, and so, a year later, on Aug. 26, 1983, it adopted Resolution 83-21 (a 90-day temporary moratorium) suspending all permitting activities pending completion of the new Regional Plan. (Pet. App., p. 170.)

But that additional 90-day moratorium was not enough, and TRPA informally allowed it to keep rolling from Nov. 26, 1983 until April 26, 1984, when it finally adopted a new Regional Plan. (Pet. App., p. 75.)[6] The 1984 Plan (Ordinance 84-1; Pet. App., p. 172) made no change in the use prohibition inflicted on these landowners. As the trial court put it, "[w]ith respect to Class 1-3 and SEZ properties . . . nothing much changed. The 1984 Plan provided, at least temporarily, that no projects proposing *any* land coverage at all in Class 1-3 and SEZ would be considered. . . . " (Pet. App., pp. 75-76; emphasis, the court's.)[7] Thus, whatever development it appeared to permit *elsewhere* in the Tahoe Basin, all of the homesites in this litigation remained untouchable.

The State of California (TRPA's staunch ally and defender in this case) sued TRPA when the 1984 Plan was

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[6] The informal extension came about when TRPA's staff realized that the formal moratorium would expire before the new regional plan was completed. Staff told the TRPA Board that it would simply not process any applications unless the Board directed it to do otherwise. (JA 130.) The Board never responded (RT 303), and thus an unauthorized moratorium bridged the gap and continued the ban on all use.

[7] As the 1984 Plan put it: "Development within land capability district 1-3 is not consistent with the goals to manage high hazard lands for their natural qualities and shall generally be prohibited. . . . " (Pet. App., p. 173.) "SEZ lands shall be protected and managed for their natural values." (Pet. App., p. 174.)

adopted because it felt the parts of the new plan dealing with *other landowners* did not comply with the restrictive/protective demands of the Compact. Shortly thereafter, Judge Garcia of the Eastern District of California enjoined TRPA from approving any building projects. That injunction remained in force until TRPA promulgated another revised Regional Plan in 1987. (Pet. App., pp. 76-77.)

But the only effect of Judge Garcia's injunction was to prevent TRPA from allowing those *other* landowners – *not these Petitioners* – to develop their properties. Had there been no such injunction, the 1984 Plan would have precluded all development on Class 1, 2, 3, and SEZ lands anyway.

For these petitioning landowners, the impact of the 1987 Plan (the one this Court reviewed in the *Suitum* litigation) was simply to extend what had gone before. The use prohibitions that had previously been labeled "temporary" in Ordinance 81-5 and then became permanent in the 1984 Plan were slightly revised but remained permanent in the 1987 Plan. *Thus, under none of the various ordinances, resolutions, informal moratoria, or formal plans TRPA issued beginning in 1981, was there anything economically beneficial or productive that these landowners could do with any of their individual homesites.* TRPA thus effectively blocked all construction for the past two decades. The only thing left for the landowners to do was to continue holding bare legal title to something that cannot be productively used, suffer foreclosure, or sell it at bargain basement prices to public buyout entities established by the two states and the federal government for a salvage operation. In the meantime, property taxes and all other burdens of property ownership went on.[8]

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[8] Because of the impact of TRPA's rolling use prohibitions, the majority of the landowners succumbed and were forced to sell their parcels for a fraction of their fair market value to one of these scavenging agencies which paid only the bare residual

Procedurally, this case has been a nightmare for the landowners. They have been in litigation for the better part of two decades and have nothing to show for it but the Ninth Circuit's "thinly disguised contempt" for their constitutional rights.[9]

They have been to the Ninth Circuit four times, and before the District Court on countless occasions.[10] In all those hearings, the lower courts refused to acknowledge the unified nature of TRPA's course of action that resulted in a continuous prohibition of all use from 1981 through the present. Thus, as shown by the grid prepared by the Ninth Circuit (Pet. App., p. 11), the lower courts sliced and diced TRPA's actions into four pieces and analyzed each piece as though the others did not exist. Slicing TRPA's use prohibitions like so much baloney, the District Court refused to consider the bulk of the time period during which all use was prohibited (1984 through the present) (Pet. App., pp. 107-108, 155) – and then the Ninth Circuit eliminated the earlier three years (Pet. App., p. 40).

After a 10-day trial in late 1998, the District Court found liability for a temporary taking for 1981 through

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value of unusable land. The Petitioners seek the difference so they may be made constitutionally whole, a result similar to the one upheld by this Court in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

[9] *TSPC I*, 911 F.2d at 1346 (Kozinski, J., dissenting in part).

[10] This began as two separate suits, one filed in California and one in Nevada (JA 1), pursuant to the venue provisions of the Compact. After separate District Court rulings resulted in separate Ninth Circuit opinions, the matters were consolidated in the Nevada District Court. The earlier Ninth Circuit opinions (all bearing the same name as the case at bench) appear at: 911 F.2d 1331 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) (referred to in the record as *TSPC I*); 938 F.2d 153 (9th Cir. 1991) (*TSPC II*); and 34 F.3d 753 (9th Cir. 1994), *cert. denied*, 514 U.S. 1036 (1995) (*TSPC III*).

1984, relying on this Court's holdings in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) for the proposition that a regulation that deprives a landowner of all economically beneficial or productive use is a compensable taking, and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) for the proposition that a temporary taking during a planning moratorium requires compensation the same as a permanent taking. The District Court denied any compensation for the impact of the 1984 Plan, asserting that it was Judge Garcia's injunction that prevented permits from issuing, not TRPA's 1984 Plan. (Pet. App., p. 106.) Finally, the District Court denied any relief from the 1987 continuation of the use prohibitions on the ground that the statute of limitations had run by the time the landowners returned from their first two Ninth Circuit appeals and amended their complaints to seek compensation for the effects of the 1987 event.[11]

The Ninth Circuit affirmed insofar as the District Court *denied* relief, and reversed the limited relief the District Court had *granted*. The Ninth Circuit simply refused to follow this Court's decision in *First English*,

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[11] The court's analysis can hold true only if the 1987 Plan is viewed as an entirely separate "event," rather than a continuation of the use prohibition that TRPA had enforced since 1981. It also required the lower courts to conclude that the landowners had a duty to file new suits against TRPA at the very time they were fighting for their litigational lives pursuing two Ninth Circuit appeals in an effort to reinstate their initial suits. Allowing amendment of the complaints once those suits were finally remanded in 1990 and 1991 would have been proper under the circumstances, and under *United States v. Dickinson*, 341 U.S. 745 (1947) [when a taking occurs through continuous government action, aggrieved landowners are not required to resort to piecemeal litigation, and are not barred by limitations when they sue on the basis of the last, not first, damaging act]. But the lower courts turned a deaf ear to their pleas.

which held that a temporary planning moratorium could be a taking (albeit a temporary one) that requires compensation for the period when use is forbidden.[12] Although both *First English* and the case at bench involved temporary planning moratoria in effect for a finite period of years, the court below asserted that it was "flatly incorrect" that *First English* had any impact here. (Pet. App., p. 29.) Then, viewing each period separately, the court held that each of the properties retained substantial value (because the life of property is theoretically infinite and there could be use left at the end of the moratorium) and therefore there could be no taking, even "assum[ing] *arguendo* [in light of the District Court's findings] that the moratorium prevented all development in the period during which it was in effect." (Pet. App., p. 34, fn. 20).

Needless to say, the Ninth Circuit's reasoning ignores the fact that, while the "life of the land" may be infinite, the lives of its mortal human owners are not, and using this approach simply strips human owners of all they own and enjoy. But, as Justice Holmes put it, the Just Compensation Clause of the Constitution "deals with people, not with tracts of land." (*Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 [1910].) More recently, this Court reaffirmed this concept by stressing that "Property does not have rights. People have rights." (*Lynch v. Household Fin. Co.*, 405 U.S. 538, 552 [1972].)

The landowners' timely Petition for Rehearing and rehearing *en banc* were both denied, with five active Circuit Judges dissenting. (Pet. App., p. 156.) This Court granted certiorari on June 29, 2001. (JA 192.)

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[12] The Ninth Circuit's holding also conflicts with its own earlier decisions in *TSPC I* and *TSPC II*, holding that such a temporary taking *could* be found.

SUMMARY OF ARGUMENT

1. Temporary takings, as this Court put it in *First English*, are not different in kind from permanent takings. This Court has consistently held that the Fifth Amendment's Just Compensation Clause guarantees that any time the government takes private property for public use, compensation will be paid. Size doesn't matter. (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 [1982].) Neither does time. (*First English.*) Thus, the core fact at bench is that TRPA's actions took the right of user from these landowners. The duration of the taking only affects the *amount* of compensation, not the *entitlement* to compensation.

2. The Ninth Circuit wholly misunderstood this Court's *First English* decision. *First English* involved a local ordinance designed to prevent all use of property for a limited period of time. In that context – and this Court has always said that the factual context of its holdings is vital to their understanding (e.g., *Cohens v. Virginia*, 6 Wheat. [17 U.S.] 264, 399-400 [1821]) – this Court concluded that temporary takings require just compensation, just like permanent takings.

But the Ninth Circuit asserted that, to be compensable, a regulation inflicting a temporary taking must be intended by its drafters to be permanent but thereafter be struck down by a court as unconstitutional or otherwise invalid. In that circumstance, said the Ninth Circuit, a temporary taking occurs and compensation is mandated. But, according to that theory (which simply contradicts *First English*), if a regulation is consciously designed to confiscate the right to all use of private property for a temporary period of time, then no compensation can be due.

The Ninth Circuit misconstrued *First English* in manifold ways, ranging from the context of that decision, to the clear language chosen by this Court, to the earlier decisions relied on as authority, to the dissenting opinion's analysis that the majority rejected. The latter takes

on added meaning, as the Ninth Circuit adopted almost verbatim (although without attribution) the language of the *First English* dissent. (See Pet. App., pp. 160-161.)

3. A conscious governmental decision to freeze temporarily all use of property is the functional equivalent of a conscious governmental decision to condemn temporarily the use of that property. From the property owners' perspective, there is no substantive difference. In either case, they are denied the ability to use their land for a period of time. From the government's perspective, there is no substantive difference either. The government eliminates the property owners' right of use for whatever period it desires.

But doctrinally, the label does not matter, because in analyzing cases at the border of police power and eminent domain, this Court has opted for viewing the reality of each situation and requiring compensation when necessary to vindicate landowners' rights and to protect the government's conscious policy choice from invalidation. This holds true regardless of the factual context[13] or the government's motivation. Indeed, the government's intent to do good (by acting to preserve the environment, for example) only satisfies the "public use" requirement of the just compensation clause, and fortifies the need for compensation when government action infringes on the rights of landowners protected by the Fifth Amendment. (E.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1175 [Fed. Cir. 1994].)

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[13] See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) [cable TV access for apartment tenants]; *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) [public access to private marina]; *Preseault v. I.C.C.*, 494 U.S. 1 (1990) [conversion of railroad easement to recreational trail]; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) [rodenticide registration]; *Dames & Moore v. Regan*, 453 U.S. 654 (1981) [curtailment of private claims following the Iranian hostage crisis]; and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) [massive railroad bankruptcies].

I

THE CONSTITUTION REQUIRES JUST COMPENSATION FOR *ALL* TAKINGS, REGARDLESS OF THEIR LENGTH OR THE MANNER OF THEIR INSTIGATION. THUS, THE ISSUE IS *NOT* WHETHER PROPERTY WAS TAKEN TEMPORARILY, BUT WHETHER IT WAS TAKEN AT ALL.

The question formulated by this Court is:

> "Whether the Court of Appeals properly determined that a *temporary* moratorium on land development does *not* constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?" (JA 192; emphasis added.)

The short and plain answer to that question is "No." But, with respect, that question – keyed specifically to the way that the Ninth Circuit Court of Appeals chose to deal with this case – may benefit from slight refinement. The real question is whether the Court of Appeals properly determined that government action freezing all productive use of private land does not constitute a taking. Characterizing TRPA's action as a "temporary moratorium" tends to obscure the real issue that springs from the fact that this "moratorium" was not of limited duration, as moratoria are required to be, nor did it permit any use of these properties during its existence, as moratoria need to do in order to avoid becoming temporary takings, nor did it permit any economically viable use of the regulated land upon its expiration.[14] Instead, it was an outright, permanent ban on *all* economically rational use of the Petitioners' land. The "temporary" nature of the first 32-month freeze on all land use was illusory because at the end of the "temporary" moratoria, the

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[14] Standard texts stress the need for all these factors to be present. (See, e.g., 1 Edward Ziegler, Rathkopf's The Law of Zoning & Planning § 11.01[3], p. 11-5 [4th ed., rev. 2001].)

prohibition of all use of Petitioners' land became permanent. Moreover, the "temporary" nature of the freeze is constitutionally irrelevant, and could only impact the amount of compensation due. Justice Brennan put his finger squarely on the issue, even though he did so twenty years ahead of schedule:[15]

> "The fact that a regulatory 'taking' may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional 'taking.' Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory 'taking' render compensation for the time of the 'taking' any less obligatory. This Court more than once has recognized that temporary reversible 'takings' should be analyzed according to the same constitutional framework applied to permanent irreversible 'takings.' " (*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657 [1981] [Brennan, J., dissenting on behalf of four Justices, but expressing the substantive views of a majority].[16]

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[15] Intriguingly, Justice Brennan wrote this opinion at the very time – early 1981 – that TRPA was adopting Ordinance 81-5, the first of the series of rolling moratoria in this case. Perhaps TRPA should have paid attention.

[16] Justice Rehnquist concurred with four other Justices that the case was not final, but then noted his agreement with Justice Brennan's group of four on the merits. (450 U.S. at 633 [Rehnquist, J., concurring].) Six years later, in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), Chief Justice Rehnquist wrote the opinion for a six-Justice majority that adopted and applied Justice Brennan's *San Diego Gas* dissent. *First English* repeatedly cites Justice Brennan's *San Diego Gas* dissent as authoritative. (482 U.S. at 315; 316, n. 9; 318.)

This section of the brief will analyze the nature of takings and show that the concept of "temporary" is doctrinally and constitutionally beside the point, as the government *always* has it within its power to make *any* taking "temporary" by returning what it took,[17] but that does not eliminate the need for compensation for the duration of the taking. The analysis will then focus on *First English* and show that the Ninth Circuit failed to understand either its factual background or its constitutional teaching.

A

All Takings Require Compensation.

Aside from direct condemnations, there are two kinds of takings, labeled by the manner of their imposition. One is caused by direct physical invasion (e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 [1982]; *United States v. Causby*, 328 U.S. 256 [1946]), the other by regulation (e.g., *First English*; *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 [1999]). But, convenient as they may be for descriptive purposes, these labels are a constitutional irrelevancy; either form requires Fifth Amendment compensation. (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 [1992].)

In his opinion in *San Diego Gas*, Justice Brennan expounded what might be called a unified field theory of takings jurisprudence. His opinion drew upon all sorts of takings without differentiation to demonstrate the common constitutional element uniting them all, and stressed the "essential similarity of regulatory 'takings' and other 'takings.' " (450 U.S. at 651.)

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[17] In *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 12 (1984) the Court explained that the government may, if it chooses, abandon even a formal condemnation proceeding after trial.

To illustrate the point, that analysis linked a permanent direct condemnation case[18] with flooding cases (both intended[19] and unintended[20]), a navigable servitude case,[21] an aircraft overflight case,[22] a mining regulation case,[23] and temporary direct condemnation cases,[24] among others. (450 U.S. at 651-653, 656-660.) In his pragmatic view, born of a bedrock belief in the Bill of Rights as the individual's shield against governmental overreaching,[25] Justice Brennan viewed all these impositions on private property owners as requiring compensation, and the fact that some of them may have been for temporary periods of time merely affected the amount of compensation that would be due. (450 U.S. at 658-660.) Later court decisions agree. See *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1583 (Fed. Cir. 1993) ["The limited duration of this taking is relevant to the issue of what compensation is just, and not to the issue of whether a taking has occurred."]; *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) ["[T]he fact that [the government's] action was finite went to the determination of compensation rather than to the question of whether a taking had occurred"].

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[18] *Berman v. Parker*, 348 U.S. 26 (1954).

[19] *United States v. Dickinson*, 331 U.S. 745 (1947).

[20] *Pumpelly v. Green Bay Co.*, 13 Wall. [80 U.S.] 166 (1872).

[21] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

[22] *United States v. Causby*, 328 U.S. 256 (1946).

[23] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[24] *Kimball Laundry Co v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

[25] See Charles M. Haar & Jerold S. Kayden, Landmark Justice 191 (1989).

The genius of this formulation is that it makes the law clear and relatively straightforward to apply.[26] When little or no damage is done, then landowners will either not file suit (this type of litigation is neither pleasant nor inexpensive)[27] or recover little or nothing after trial.[28] Legally, however, it recognizes a freeze on use for what it is: a taking for the duration of the freeze.

The language of the Fifth Amendment is clear and not to be tampered with. When government action interferes severely with the ability of private property owners to use their land in an economically viable fashion, then a taking occurs and compensation must be paid:

> "The language of the Fifth Amendment prohibits the 'tak[ing]' of private property for 'public use' without payment of 'just compensation.' As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a

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[26] That would be a welcome respite from the welter of criticisms traditionally heaved in the direction of takings law. For a collection of citations to such scholarly commentary, see Walter, *Appraisal Methods and Regulatory Takings: New Directions For Appraisers, Judges, and Economists*, 63 Appraisal J. 331 (1995).

[27] This Court's own records reveal the lengths to which such litigation can go. The case at bench, for example, was filed in 1984, and resulted in four separate trips to the Ninth Circuit before arriving here. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) began its administrative proceedings in 1981 and its litigation in 1986 before concluding in 1999. Another currently active case, *A.A. Profiles v. City of Fort Lauderdale*, 253 F.3d 576 (11th Cir. 2001), began litigation in 1981 and is still going. Similarly, *Florida Rock Products, Inc. v. United States*, 45 Fed. Cl. 21 (1999) was filed in 1982, has resulted in at least five published opinions, and is on appeal again.

[28] As this Court recognized in *Kirby*, 467 U.S. at 19, fn. 29, property owners are not likely to litigate unless the harm for which recompense is sought is substantial.

> constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a 'taking,' compensation *must* be awarded." (450 U.S. at 654; Brennan, J., dissenting; citations and internal quotation marks omitted; emphasis in original].)

Six years later, when this Court adopted Justice Brennan's theory as its own in *First English*, it analyzed and applied the same mix of takings cases – direct condemnations, along with a variety of physically invasive and regulatory inverse condemnations, permanent and temporary (482 U.S. at 314-319) – and reached the same conclusion: all forms of taking require compensation under the Fifth Amendment. Indeed, this Court emphasized the similarity between direct condemnations for short periods and regulatory takings for similar time periods, and concluded that the two are "not different in kind." (482 U.S. at 318.)

In one of the first lower court applications of *First English*, the Eleventh Circuit Court of Appeals concluded that, "[i]n the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit." (*Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 [11th Cir. 1987].) That is an apt description of what happened here. Although evidence of individual impacts was not produced in the liability phase of the trial (see JA 79), TRPA's regulations showed plainly that no use was permitted. (Pet. App., pp. 168-174.) Thus those regulations plainly took the property's use and potential for whatever period of time the Court cares to examine between 1981 (when Ordinance 81-5 was adopted) through the present (when the intervening "temporary" actions, along

with the semi-permanent 1984 Plan and the actually permanent 1987 Plan continued the prohibition on productive use).

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) brought it all together.[29] That case involved South Carolina's effort to protect and preserve its shoreline. After all but two lots in an exclusive oceanfront residential subdivision had been built upon, a new law prevented any further construction. This Court held that the owner of the last two vacant lots was entitled to compensation if the new law precluded all economically beneficial or productive use of his land. (505 U.S. at 1015.) The Court expressly reaffirmed Justice Brennan's *San Diego Gas* analysis that deprivation of economically productive use is, from the owner's viewpoint, the same as taking physical possession. (505 U.S. at 1017.) On remand, the South Carolina Supreme Court found a temporary taking as a matter of law and ordered compensation. (*Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 [S.C. 1992].)

From his vantage point in academia, Professor Tribe read this case law as meaning that " . . . forcing someone to stop doing things with his property – telling him 'you can keep it, but you can't use it' – is at times indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else." (Laurence Tribe, American Constitutional Law § 9-3 at 593 [2d ed. 1988].) Professor Epstein, viewing things from the opposite end of the ideological spectrum, agrees: "What stamps a government action as a taking is what it does to the property rights of each individual who is subject to its actions:

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[29] Even commentators who argued that *Lucas* established nothing new had to concede that it had synthesized and recompiled much of what had gone before. (E.g., Jerold S. Kayden, *Old Wine in New Bottles*, 46 Land Use Law & Zoning Digest, no. 9, p. 9 [Sept. 1992].)

nothing more or less is relevant." (Richard Epstein, Takings: Private Property and the Power of Eminent Domain 94 [1986].) Proceeding from the scholarly to the mundane, the idea that deprivation of the right to use property is a serious infringement of ownership may be found in even the most general of texts:

> " . . . if one is deprived of the use of his or her property, little but a barren title is left in his or her hands." (63C Am Jur 2d, Property § 3 at 69 [1997].)

"Barren title" is precisely what TRPA left these Petitioners. When it took everything else – regardless of the time period – it became obligated to compensate those whose property was commandeered for the general public good.

B

A Seizure Of The Right To Use Property – Even Temporarily – Requires Compensation.

The Fifth Amendment's just compensation guarantee is not concerned with the niceties of legal form, but with the practical impact of government actions on the owners of private property. (See *United States v. Dickinson*, 331 U.S. 745, 748 [1947] ["Constitution is intended to preserve practical and substantial rights, not to maintain theories. . . . "].) For "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." (*Hughes v. Washington*, 389 U.S. 290, 298 [1967] [Stewart, J., concurring] [emphasis in original]; see also *Davis v. Newton Coal Co.*, 267 U.S. 292, 302 [1925] ["The taking was for a public use. The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment."]; *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 889 [Fed. Cir. 1983].)

If a government agency were to condemn property temporarily for a passive use, as it does regularly (e.g.,

for a scenic easement), no one would seriously suggest that compensation should not be paid. (See the Court's discussion in *First English*, 482 U.S. at 318, applying this direct condemnation concept to regulatory takings and showing the applicability to regulatory takings of the wartime condemnations of temporary use in *Kimball Laundry Co v. United States*, 338 U.S. 1 [1949]; *United States v. Petty Motor Co.*, 327 U.S. 372 [1946]; and *United States v. General Motors Corp.*, 323 U.S. 373 [1945].) In like vein, when regulations have the same effect (of denying owners the use of their land) through the exercise of the police power, there is no functional difference between the two modes of government action. (*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652 [1981] [Brennan, J., dissenting].) Either way, the owners are deprived of the use and enjoyment of their land, and it is that deprivation, not the formal acquisition of title by the government, that is the mechanism of the taking. (*General Motors*, 323 U.S. at 378; *Kirby*, 467 U.S. 1 at 14; see also *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 244 [1984].)

Justice Brennan's *San Diego Gas* analysis also showed that, insofar as the applicability of the Just Compensation Clause is concerned, there is no constitutional content in the temporariness of a taking. In essence, he aptly concluded that *all* takings are temporary, because the government can always revoke a regulation or cease a physical invasion or surrender possession. (450 U.S. at 657, 659-660.)

In *First English*, this Court directly faced the question of whether the length of time made any constitutional difference. The dissent thought it did. (482 U.S. at 322.) The majority, however, decided it did not. (482 U.S. at 318.)

Shortly thereafter, the Court of Appeals for the Federal Circuit explained (through Judge Plager, who spent

his formative years as a property professor) why temporary takings are, from a jurisprudential standpoint, the same as permanent takings:

> "Part of the difficulty here is the confusion that arises in the cases and commentaries over the use of the term 'temporary taking.' The argument in *Agins*, which was finally laid to rest in *First Lutheran Church*, was that a regulatory taking, unlike a physical taking, is by its nature 'temporary.' This is because the government, upon being told the regulation was overly intrusive and therefore a taking (by whatever test), could rescind or amend the regulation.
>
> "It is equally true, however, that the government when it has taken property by physical occupation could subsequently decide to return the property to its owner, or otherwise release its interest in the property. Yet no one would argue that that would somehow absolve the government of its liability for a taking during the time the property was denied to the property owner. All takings are 'temporary,' in the sense that the government can always change its mind at a later time, and this is true whether the property interest taken is a possessory estate for years or a fee simple acquired through condemnation, or an easement of use by virtue of a regulation." (*Hendler v. United States*, 952 F.2d 1364, 1376 [Fed. Cir. 1991].)

Decades earlier, this Court had noted the unfairness that can occur "when the Government does not take [a property owner's] entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute and leaves [the property owner] holding the remainder, which may be altogether useless to him. . . . " (*United States v. General Motors Corp.*, 323 U.S. 373, 382 [1945].) That perfectly describes the situation at bench, where TRPA chopped off the right to use each of these lots a slice at a time and left the owners

holding a remainder that was "altogether useless to [them]."

Thus, the real question is whether a taking has occurred, and that depends on the impact of the governmental action on the ability of the landowner to make economically productive use of the land. Justice Holmes put it quite directly for this Court shortly after the turn of the last century, saying "the question is, What has the owner lost?" (*Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 [1910].) As the Federal Circuit Court of Appeals put it more recently, "[n]othing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests." (*Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1568 [Fed. Cir. 1994].)

In *Lucas*, where this Court considered the Fifth Amendment implications of a South Carolina regulation that precluded all economically productive use of two subdivided residential parcels, the Court aptly noted "the practical equivalence in this setting of negative regulation and appropriation." (505 U.S. at 1019.)

Most recently, in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), this Court upheld a jury's award of compensation for a temporary taking after a city repeatedly denied permission to develop houses on residentially zoned land. Although the Court acknowledged that it had not provided a "definitive statement of the elements of a claim for a temporary regulatory taking" (526 U.S. at 704), it upheld a judgment based on jury instructions drawn from cases dealing with permanent takings. In this most recent temporary taking case, the Court thereby reaffirmed the *San Diego Gas/First English* view that the essential underlying jurisprudence is the same for temporary takings as for all others.

This Court has frequently reverted to the property professors' "bundle of sticks" analogy in takings cases. (E.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176

[1979].) In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court concluded that even a miniscule physical taking required compensation because "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." (458 U.S. at 435.) The same is true here. The impact of TRPA's regulations has been to freeze the ability of these landowners to assert any of the ordinary rights of landownership. Assuming the taking to have been "temporary" (although the reality is that freezing for two decades – and counting – is about as permanent as it gets), that temporary action similarly "chops through the bundle, taking a slice of every strand." There are no strands left for the owners to enjoy – unless one considers the joy of paying taxes a beneficial use of the land. (Compare *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y.2d 222, 232 [1938] [confiscation would at least relieve the owners of their tax burdens].)

Thus, whether a taking is permanent or temporary is really not a valid constitutional distinction, and the Ninth Circuit erred prejudicially when it sought to carve out a species of regulatory taking and immunize it from the constitutional mandate of compensation.

C

First English Mandates Compensation For The Impacts Of Deliberate Planning Moratoria That – By Definition – Take The Right To Make Economically Productive Use Of Property. The Ninth Circuit Wholly Misunderstood That.

A primary reason these landowners believe the Ninth Circuit erred in its decision is that that court wholly misunderstood *First English*, and therefore concluded that it could only find Fifth Amendment liability if a permanent regulation were struck down for some reason. Such

liability, it said, *could not* apply to a deliberate moratorium designed for a temporary – even though indefinite – lifetime.[30] Indeed, the idea conjured up below that *First English* can only apply when permanent ordinances are struck down is belied by *First English* itself. There, this Court *refused* to accept the proposition "that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid." (482 U.S. at 320.) In other words, the deliberate – and otherwise valid – taking of the use of land for a period of years can be a temporary taking that requires compensation. (482 U.S. at 315.) The remaining errors in the Ninth Circuit's reading of *First English* are manifold.[31]

First, it is important that *First English* was about a temporary planning moratorium. This Court has repeatedly said that its holdings cannot be divorced from their context, and that their true meaning can only be understood in light of the facts in the underlying case.

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[30] The Ninth Circuit's plain error is highlighted by cases such as *Lomarch Corp. v. Mayor of Englewood*, 237 A.2d 881 (N.J. 1968) [denial of all use of land for one year is a taking and is tantamount to the purchase of an option on the land]; *Steel v. Cape Corp.*, 677 A.2d 634 (Md. App. 1996) [moratorium based on facilities shortage was a taking]; *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1073 (11th Cir. 1996) [one-year building permit moratorium could be a temporary taking]; *Schiavone Constr. Co. v. Hackensack Meadowlands Dev. Commn.*, 486 A.2d 330 (N.J. 1985) [19 month moratorium could be a temporary taking]; *Eastern Minerals Int'l, Inc. v. United States*, 36 Fed. Cl. 541 (1996) [failure to timely review mining permit application was a compensable taking]; *Keshbro, Inc. v. City of Miami*, ___ So.2d ___, 2001 WL 776555 (Fla. 2001) [closure of apartment complex for one year was a temporary taking].

[31] One respected commentator put it bluntly, saying the Ninth Circuit's "analysis is inconsistent with *First English*." (Steven J. Eagle, *Temporary Regulatory Takings and Development Moratoria: The Murky View From Lake Tahoe*, 31 Envtl. L. Rep. 10224 [2001].)

(E.g., *Cohens v. Virginia*, 6 Wheat. [17 U.S.] 264, 399-400 [1821].)

Lost in the Ninth Circuit's conclusion that *First English* only applies to regulations intended to be permanent but struck down as illegal is the plain fact that *the only thing before this Court in First English was the constitutional consequence of an ordinance that was designed to be in effect for a limited period of time*. Rather than allowing the First English Evangelical Lutheran Church to simply rebuild the camping facility that it lost in a storm, Los Angeles County enacted a moratorium which, under California law, *could not exceed two years*. (See Cal. Gov. Code § 65858.) Thus, the temporary use prohibition was always intended to be of finite duration, and everyone knew the maximum length it could be. The Ninth Circuit simply ignored that.[32]

The error in the Ninth Circuit's view is apparent from this Court's recent decision in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). The landowner claimed that the city had taken its property through a series of subdivision denials because that action temporarily took all economically productive use, and also because the city's reasons failed to substantially advance a legitimate state interest. *No city action was ever struck down or invalidated*. The jury simply awarded compensation for the temporary taking caused by that delay, and this Court affirmed.[33]

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[32] Others understand that *First English* involved a moratorium, rather than a truncated permanent restriction. (E.g., Daniel R. Mandelker, Jules B. Gerard & E. Thomas Sullivan, Federal Land Use Law § 2A.05[2][c], p. 2A-64 [rev. 2001].)

[33] The Ninth Circuit's analysis also ignores the *Agins* litigation that preceded *First English*, and on which the latter was based. In *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980), the California Supreme Court held that compensation was not available as a remedy for a regulatory taking. Thus, as this Court acknowledged, the landowner's claims in *First English* "were deemed irrelevant [by the California Court of Appeal] solely because of the California Supreme Court's decision in *Agins* that damages are unavailable to redress a 'temporary' regulatory taking." (*First English*, 482 U.S. at 312.) The challenge in *Agins*, like those in *First English* and in the case at bench, was *not* directed at a "permanent" regulation rendered "temporary" because a court struck it down. Dr. and Mrs. Agins complained about the impact of the city's protracted study of its options to condemn the property for a public park, and its subsequent downzoning. The study period was plainly temporary, and the downzoning was never struck down.

Second, given the finite length of the *First English* moratorium, it would seem inescapable that this Court intended its decision to apply to planning moratoria that were designed to be in effect for only a limited period of time. *Knowing that the suit dealt only with the two year planning moratorium (rather than the permanent development ban that replaced it)* (482 U.S. at 313, fn. 7), the Court said it was dealing with a use prohibition that lasted for "a considerable period of years" (482 U.S. at 322).[34] And the Court noted that, in that context, deprivation of use was the equivalent of condemning a leasehold interest in the property for that period of time, an interest that "may be great indeed." (482 U.S. at 319.)[35]

Third, this Court contrasted that "considerable period" of deliberate use prohibition with the "normal

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[34] The Court was expressly aware that the "temporary" ordinance was adopted in 1979 (482 U.S. at 307) and replaced by a "permanent" ordinance in 1981 (482 U.S. at 313, fn. 7).

[35] In property terms, what is taken is "an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute. (While called an estate for years, the term can be for less than a year.)" (*Hendler*, 952 F.2d at 1376.) See also Steven J. Eagle, *Just Compensation For Permanent Takings of Temporal Interests*, 10 Fed. Cir. B.J. 485, 502 (2000): "The term 'taking of a leasehold interest' expresses the relationship best."

delays in obtaining building permits, changes in zoning ordinances, variances, and the like. . . . " (482 U.S. at 321.) Although the Court went no further in explicating "normal delays" in the land use approval process, the carefully chosen illustrations would seem to have no impact at bench. Each of them illustrates a process in which a landowner is participating with the expectation – or at least the possibility – of obtaining development permission at the conclusion.

But the situation must be otherwise where the regulation is a total development freeze, and particularly where the freeze is in the context at bench, where TRPA has always thought that the only way for it to accomplish its task of protecting Lake Tahoe was to prevent all development on the lots that are now before this Court. TRPA has characterized these lots as presenting a "high hazard" to the lake's environmental recovery and preservation. Prohibition cannot by any stretch be considered an exemplar of "normal delay" for landowners working their way through the planning process.[36]

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[36] Moreover, it would seem that such "normal" delays would be less than the two years in *First English*, as that one had been described as "considerable." There is also legislative guidance as to "normal" planning parameters. Such expressions are found in so-called permit streamlining acts which appear in many states. Such statutes "deem" projects approved by operation of law if applications are not acted on in a specified period of time. (See generally 5 Ziegler, Rathkopf's The Law of Zoning and Planning § 66.04 [4th ed. 2001]; 4 Young, Anderson's American Law of Zoning, Subdivision Controls, § 25.16 [4th ed. 1996].) Such statutes were enacted to provide disincentives to governmental sloth. (See generally Annot., *Zoning: Construction and Effect of Statute Requiring That Zoning Application Be Treated As Approved If Not Acted On Within Specified Period Of Time*, 66 A.L.R.4th 1012, 1023.)

While California grants government agencies a leisurely year to review projects (Cal. Gov. Code § 65950), the norm elsewhere is thirty to sixty days. For discussion and application

> "Delays associated with, for example, studies preceding the adoption of rezonings or new comprehensive plans are not a normal delay referenced by the Court in *First English*." (Wendy U. Larsen & Marcella Larsen, *Moratoria as Takings Under* Lucas, 46 Land Use Law & Zoning Dig., no. 6, p. 3 at 5 [1994].)[37]

Fourth, in finally deciding the remedy question that had dogged the Court for the better part of a decade (see *First English*, 482 U.S. at 310-311), the Court obviously believed that a planning moratorium *could* require Fifth Amendment compensation. Otherwise, why pick *that* vehicle (i.e., a case involving an avowedly temporary denial of use) to decide the remedy question? Surely, the Court would not have addressed the issue in *First English* if it believed that the underlying substantive claim *could not* result in a 5th Amendment taking as a matter of law.[38] But it did not.

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of representative statutes, see, e.g., *American Tower, L.P. v. City of Grant*, 621 N.W.2d 37 (Minn. App. 2001) [60 days]; *Gunthner v. Planning Board*, 762 A.2d 710 (N.J.S. 2000) [45 days]; *Romesburg v. Fayette County Zoning Hearing Bd.*, 727 A.2d 150 (Penn. Comm. Ct. 1999) [45 days]; *City of Birmingham Planning Commn. v. Johnson Realty Co., Inc.*, 688 So. 2d 871 (Ala. App. 1997) [45 days]; *Pope v. De Poala*, 574 N.Y.S.2d 869 (1991) [30 days]; *Marandino v. Planning & Zoning Commn.*, 573 A.2d 768 (Conn. App. 1990) [65 days]. It would seem appropriate to utilize such statutes as guidelines for what is "normal" in the planning process, as they contain legislative determinations about how long the planning approval process ought to take.

[37] To the same effect: Michael A. Zizka, et al., State & Local Government Land Use Liability § 4:4, p. 4-10 [rev. 2000].)

[38] Counsel for the County had urged the Court in *First English* to decide that there was no taking, and therefore not decide the remedy issue (Transcript of oral argument, pp. 36-37; 482 U.S. at 312-313), so it cannot be said that the option escaped unnoticed. Nor could it be said that the Court was unaware of this option, as it had employed it in *San Diego Gas* (450 U.S. at 633).

Fifth, the cases on which the Court chiefly relied in *First English* to establish the right to recover for a temporary regulatory taking were direct condemnation cases in which the government condemned the right to use property for a finite period of years. The time periods involved were all about one year, with options to renew. (*United States v. General Motors Corp.*, 323 U.S. 373, 374-375 [1945]; *United States v. Petty Motor Co.*, 327 U.S. 372, 374 [1946]; *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3 [1949].)[39] The Court also relied on *United States v. Dow*, 357 U.S. 17, 26 (1958), which concluded that governmental abandonment of a direct condemnation merely "results in an alteration in the property interest taken – from [one of] full ownership to one of temporary use and occupation [citing the three wartime temporary condemnations cited above for how to value that 'alteration' in the property estate taken]."

That is what the Court evidently contemplated in *First English* when it discussed temporary takings. *That* is the kind of time element the Court envisioned when it noted, with dry understatement, that "[t]he United States has been required to pay compensation for leasehold interests of shorter duration than this [i.e., the period of non-use inflicted on the church]." (482 U.S. at 319.) It thus seems clear that *that* is what the Court had in mind when it said that "[t]hese [direct condemnation] cases reflect the fact that 'temporary' takings which, as here, deny a

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[39] *Petty Motor* was a three-year lease, but it was terminable at the Government's option on each one-year anniversary. See also *United States v. Causby*, 328 U.S. 256 (1946), in which the Government had leased an airport for one year, with options to renew until the end of the war. This Court agreed that overflights from the airport took flight easements over neighboring property, but remanded the matter for the trial court to determine whether they were permanent or temporary and to award compensation accordingly. Thus, the time of the inverse taking was keyed to the temporary nature of the lease by which the United States occupied the facility.

landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." (482 U.S. at 318.)

Sixth, the issue of what the Ninth Circuit called "temporal severance" (Pet. App., p. 21) is not really an issue at all. Or, if it had been an issue, it was resolved by *First English*. As noted earlier, the idea of dealing with property interests of finite duration is something that the law has done since time immemorial. Leasehold estates have long been known, as have temporary tenancies at sufferance. The temporary taking of part of a leasehold requires compensation. (*Bass Enters. Prod. Co. v. United States*, 133 F.3d 893 [Fed. Cir. 1998], *on remand* 45 Fed. Cl. 120 [1999].) Direct condemnations for periods shorter than those involved at bench have also been routinely dealt with.[40] Thus, after it cleared away the procedural underbrush that had prevented it from reaching the compensation issue earlier in the decade, this Court framed the issue clearly:

> "We now turn to the question whether the Just Compensation Clause requires the government to pay for "temporary" regulatory takings." (482 U.S. at 313.)

Whether the taking of such a time-limited interest *could* constitutionally require compensation was a substantial point of disagreement between the *First English*

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[40] As the Federal Circuit Court of Appeals put it:

> "Identification of a specific property interest to be transferred to the Government should pose little problem for property lawyers. Property interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and nonpossessory. They can be defined in terms of sequential rights to possession (present interests – life estates and various types of fees – and future interests), and in terms of shared interests. . . . " (*Florida Rock*, 18 F.3d at 1572, fn. 32.)

majority and dissent. The dissent said it could not. The majority said it could. The Ninth Circuit disregarded the majority and applied the dissent. (See Pet. App., p. 160.)

In sum, the decision in *First English* dealt with precisely the kind of regulation as the one held up for examination by the Ninth Circuit at bench. Regardless of some of the other discussion in the opinion, the decision in *First English* was rendered in the context of a two-year planning moratorium that had long since expired by its own terms by the time this Court analyzed it. It is thus a patently false premise to say that *First English* only applies to regulations intended to be permanent but struck down for some constitutional defect. The moratorium involved there was *never* struck down; it was always intended to last for a maximum of two years – and did.

II

FROM A LANDOWNER'S POINT OF VIEW, GOVERNMENT IMPOSITION OF A FREEZE ON ALL ECONOMICALLY PRODUCTIVE USES, ALBEIT TEMPORARILY, IS THE EQUIVALENT OF A TEMPORARY CONDEMNATION OF SUCH LAND. IN EITHER EVENT, THE RIGHTFUL OWNER'S *USE* OF THE LAND HAS BEEN TAKEN, AND JUST COMPENSATION IS DUE.[41]

This case involves TRPA's deliberate legislative decision to forbid the use of the Petitioners' single-family, subdivided lots for the greater good of the Tahoe Basin in particular and the American public in general. In practical terms, that studied and thoughtful action was no

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[41] "From the property owner's point of view, it may matter little whether his land is condemned or . . . whether it is restricted by regulation to use in its natural state, if the effect . . . is to deprive him of all beneficial use of it." (*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652 [1981] [Brennan, J., dissenting].)

different than a decision to condemn the right to use that same land – either for a period of years or forever. This section of the brief demonstrates the legal equivalence of such actions and the consequent necessity for compensation to legitimize the freeze under the Fifth Amendment.

A

"Eminent Domain" And "Police Power" Are Really Two Sides Of The Same Coin.

As one commentator put it, Justice Holmes' *Pennsylvania Coal* opinion demonstrated that the eminent domain power and the police power "were really two ends of a continuum that can be called 'governmental power.' " (Gus Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L.J. 15, 38 [1983].)[42] Others viewed Justice Brennan's *San Diego Gas* dissent as an updating of Justice Holmes' theory:

> "Stripping away empty formalisms, [Justice Brennan] . . . introduced the pragmatic notion of a *'de facto* exercise of the power of eminent domain,' sensibly suggesting that an overzealous exercise of the police power may concurrently be an exercise of the eminent domain power." (Charles M. Haar & Jerold S. Kayden, Landmark Justice 41 [1989].)

As if to illustrate the point, this Court has repeatedly invoked the just compensation provision of eminent domain to validate police power actions that – without compensation – would be unconstitutional. (See, e.g., *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 [1974]; *Dames & Moore v. Regan*, 453 U.S. 654, 689 [1981]; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 [1984].)

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[42] See also 1 Nichols on Eminent Domain, § 1.42[7], p. 1-269 (rev. 3d ed. 2001): "[T]he police power is but another name for the power of government."

These cases build on the hornbook proposition that, when examining a legislative enactment for constitutionality, that construction should be applied that renders the enactment constitutional, rather than void. (*Fletcher v. Peck*, 6 Cranch [10 U.S.] 87, 128 [1810]; *Regional Rail*, 419 U.S. at 134.)

This Court's solution has been to require eminent domain compensation to validate legislative exercises of the police power that impaired private property rights. (See *Hurley v. Kincaid*, 285 U.S. 95 [1932].) When, for example, Congress decided to establish the Point Reyes National Seashore in northern California, it provided no timetable for the acquisition and seemed in no hurry to appropriate money for that purpose, even as landowners in the area were being abused by questionable government tactics. The U.S. Court of Claims allowed an inverse condemnation action, a process of which it said Congress was aware, and that "was available in case the convergent pressures on any landowner became great beyond its expectation," a process that had "saved the day in many another sticky situation." (*Drakes Bay Land Co. v. United States*, 424 F.2d 574 [Ct. Cl. 1970].) Just so.

That solution properly defers to legislative bodies on matters of policy. Here, for example, TRPA made a policy decision that it was necessary to prevent private use of residentially-zoned and subdivided – but not yet developed – land. Rather than interfere with that policy by enjoining it or overturning it at the instance of some of the impacted landowners, the proper judicial role is to ensure fairness to the landowners by mandating compensation for the period of the freeze. That way, the government gets what its policy makers ordered, but the cost is spread among those that benefit. (See *Armstrong v. United States*, 364 U.S. 40, 49 [1960].)

In similar fashion, when examining the validity of eminent domain actions, this Court has held that the determination of whether property is taken for a "public use" involves "what traditionally has been known as the police power." (*Berman v. Parker*, 348 U.S. 26, 32 [1954].)

This Court's blending of the concepts in order to validate each of them demonstrates the wisdom of Professor Beuscher, who noted several decades ago that "those writers who emphasize the separate air tight, non-overlapping character of the two basic powers – police power and eminent domain – have been too glib." (Joseph Beuscher, *Notes on the Integration of Police Power and Eminent Domain by the Courts: Inverse Condemnation*, in J. Beuscher & R. Wright, Land Use 724 [1969].)[43]

Thirty years after *Berman*, the Court reaffirmed its conclusion when determining whether the Hawaii legislature could authorize the use of the eminent domain power to end a land oligopoly. Most of the private land in Hawaii was owned by a few large estates that leased residential lots to tenants who then built and owned homes on those lots. The Hawaii legislature decided to use the power of eminent domain to condemn the underlying fee title and transfer it to the tenants. The question was whether that was a "public use" that could satisfy the constitutional limitation on the use of this "most awesome power"[44] of government. Speaking for a unanimous eight-Justice Court, Justice O'Connor concluded that in eminent domain law:

> "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." (*Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 [1984].)

With that simple declarative sentence, the Court unified the juridical underpinnings of the eminent domain power and the police power, and laid the groundwork for

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[43] See also Bauman, *supra*, 15 Rutgers L.J. at 53: " . . . as the 'police power' is adapted to more and increasingly complex applications, the police power/eminent domain dichotomy becomes less useful and more anachronistic." (Collecting citations to numerous commentators who share that view.)

[44] See *City of Oakland v. Oakland Raiders*, 174 Cal.App.3d 414, 419, 220 Cal.Rptr. 153 (1985); *Winger v. Aires*, 89 A.2d 521, 522 (Pa. 1952).

the answer to the question at bench. When a legislative body exercises its discretion to use the eminent domain power, the deference accorded that decision is well nigh conclusive. (*Hawaii Housing Auth.*, 467 U.S. at 240-241.) And that decision automatically invokes the self-executing command to pay just compensation for whatever property is taken in the process. (*Berman*, 348 U.S. at 36; *First English*, 482 U.S. at 315; *Jacobs v. United States*, 290 U.S. 13, 16 [1933].)

In like manner, the conscious decision of a legislative body to act through an exercise of its police power, by deliberately blocking the ability of selected landowners to make any use of their land – for whatever time and whatever reason – is a decision generally committed to that body's discretion. Such a conscious decision should carry with it the same consequence as the conscious decision to authorize condemnation: compensation for any private property taken in the process. In other words, the substantive law of takings turns on the substance of what the government does and how its actions impact on the landowner – not on what alternative label the government chooses to affix to its action. (See *Richmond Elks Hall Assn. v. Richmond Redev. Agency*, 561 F.2d 1327, 1332 [9th Cir. 1977] [applying *Berman* to a regulatory taking]; *City of Austin v. Teague*, 570 S.W.2d 389, 391 [Tex. 1978] [calling the labels "not helpful" because the two concepts "merge at so many places"].)

B

A "Police Power" Freeze On The Use Of Vacant Land And An "Eminent Domain" Taking Are Functionally – and Constitutionally – The Same.

In a typical regulatory taking case, a government agency enacts a regulation that denies landowners the right to use their land productively. This may be by way of a down-zoning, or a permit denial, or a variance denial, or the like. (See, e.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 [1978]; *Agins v. City of Tiburon*, 447 U.S. 255 [1980]; *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 [1981]; *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 [1985]; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 [1986].) But such negative impact is generally not the *raison d'etre* of the regulation. Rather, in such cases, the regulations are primarily designed to readjust the uses of, and relationships among, lands within the jurisdiction. Even so, when the impact of such well-intended regulations is so severe that it denies private landowners economically productive use of their land, then compensation must be paid. (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 [1992].)

By contrast, when a government agency enacts a freeze (or moratorium) on development, the *sole* purpose of that action is to foreclose (for either a finite or indefinite period of time) the landowners' ability to make *any* use of their land. The reason behind such a freeze may be to permit a "time out" in the face of changed conditions so that the local planners can study the potential uses of land in the area without having development take place during their study period, or it could be to delay further development until public facilities are adequate to serve it, or it could be to preclude development improperly under the guise of a facility shortage. (See, e.g., *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 [1987]; *Lockary v. Kayfetz*, 917 F.2d 1150 [9th Cir. 1990].)

Sometimes moratoria are abused by local agencies, mouthing the words of planning propriety while intending all along to simply prevent use forever – or at least as long as possible.[45] Without any constitutional consequences, such actions will not stop. This is not, of course,

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[45] See, e.g., Mark L. Pollot, Grand Theft and Petit Larceny: Property Rights in America xviii (1993), describing the City of Bolinas, California, that used a bogus water moratorium to prevent development of new homes for decades; Wendy U. Larsen & Marcella Larsen, *Moratoria as Takings Under* Lucas, 46

to say that all moratoria are ill motivated. Nonetheless, without a constitutional counterweight, government agencies – however motivated – have no reason to apply an appropriate cost/benefit analysis to their actions. And that, after all, is the essence of democratic choice: the people should be able to decide whether they (or their planning representatives) "need" to impose severe restrictions so much that they are willing to pay a price for doing so, rather than fobbing off the cost on those who happen to own undeveloped property, and telling them that they – and only they – need to pay this cost as the price of living in a civilized society.

Notwithstanding the Ninth Circuit's view that such moratoria are an essential part of the planning process that should be vigorously protected by the judiciary so that planning agencies can pursue their actions without cost to the general public (Pet. App., p. 27), the situation is jurisprudentially the reverse.

If, *a fortiori*, under cases like *Lucas*, compensation is due even where the government does *not* intend to deny productive land use (but the impact of its regulation does so anyway), the need for compensation should be all the more apparent when prohibition of use is the *sine qua non* of the regulation. The more clearly the government intends to take the use of the land for a period of time, the more clear is the need for Fifth Amendment compensation.[46] This Court long ago held that private property

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Land Use Law & Zoning Dig., no. 6, p. 3 (1994); Garrett Power, *Multiple Permits, Temporary Takings, and Just Compensation*, 23 Urban Lawyer 449 (1991) (Prof. Power discusses improper government tactics in general, and concludes that "Good economics and good government demand compensation. Time is money; cost internalization keeps the locals honest." (*Id.* at 459.)

[46] It is clearer still in a case like this, where the "temporary" freeze on development was replaced by a permanent freeze that continues to this day. In the typical temporary taking, "the

cannot cavalierly be commandeered without payment simply "because the public wanted it very much." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 [1922].) The Ninth Circuit's transmogrification of a moratorium from a limited-use planning tool, reserved for special occasions, into a boundless government technique for stultifying all reasonable private land uses, trenches on that basic constitutional doctrine.

C

Good Government Intentions Do Not Vitiate The Need For Compensation – In Fact, They Reinforce It.

The Fifth Amendment is not concerned with the propriety or virtue of the regulators' purpose in freezing the use of private property, or the exigency of the situation that gave rise to the perceived need for it. For a proper exercise of the police or eminent domain power, the underpinning of such a beneficent purpose must exist; otherwise the action is *ultra vires* and void. That much was plainly settled no later than 1922, when this Court examined a statute designed to stop land subsidence caused by underground coal mining and concluded that the prerequisites for exercise of both police power and eminent domain were present:

> "We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of the power of eminent domain. But the question at bottom is upon whom the loss of

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property is returned to the owner when the taking ends. . . . " (*Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577, 1580 [Fed. Cir. 1990].) Here, the property – that is to say the right to make productive use of the land – has never been "returned" to its titular owners.

the changes desired should fall." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 [1922].)[47]

Pennsylvania Coal was merely one in a long line of decisions in which this Court – speaking from varied points on its ideological spectrum – patiently, and consistently, explained to regulatory agencies that the general legal propriety of their actions and the need to pay compensation under the Fifth Amendment present different questions, and the need for the latter is not obviated by the virtue of the former. Emphasizing the point, the dissenting opinion in *Pennsylvania Coal* had argued the absolute position that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking." (260 U.S. at 417.) Eight Justices rejected that proposition. It is apparently necessary to say so yet again.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), New York's highest court upheld a statute as a valid exercise of the police power, and therefore dismissed an action seeking compensation for a taking. This Court (through Justice Marshall) put it this way as it reversed:

> "The Court of Appeals determined that § 828 serves [a] legitimate public purpose . . . and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that*

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[47] See also *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571, fn. 28 (Fed. Cir. 1994): "It is necessary that the Government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest. . . . " More than that, it assumes that the Government is acting pursuant to lawful authority. If not, the action is *ultra vires* and void. (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 [1952] [unlawful wartime seizure voided]; compare *United States v. Peewee Coal Co.*, 341 U.S. 114 [1951] [compensation mandatory after lawful wartime seizure].)

> *compensation must be paid.*" (*Loretto*, 458 U.S. at 425; emphasis added.)

Similarly, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Corps of Engineers had decreed that a private marina be opened to public use without compensation. This Court disagreed, and explained (through [then] Justice Rhenquist) the relationship between justifiable regulatory actions and the just compensation guarantee of the Fifth Amendment:

> "In light of its expansive authority under the Commerce Clause, there is *no question* but that Congress *could* assure the public a free right of access to the Hawaii Kai Marina if it so chose. *Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate question.*" (*Kaiser*, 444 U.S. at 174; emphasis added; citations omitted.)

In a similar vein are cases like *Preseault v. I.C.C.*, 494 U.S. 1 (1990) (Brennan, J.), *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (Blackmun, J.), *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (Rehnquist, J.), and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (Brennan, J.). In each of them, this Court was faced with the claim that Congress, in pursuit of legitimate objectives, had taken private property in violation of the Fifth Amendment. The governmental goal in each was plainly legitimate (respectively, the creation of recreational trails, the licensing of pesticides, dealing with the aftermath of the Iranian hostage crisis, and widespread railroad bankruptcy). Nonetheless, the Court did not permit those proper legislative goals to trump the constitutional need for compensation when private property was taken in the process. In each, the Court directed the property owners to the Court of Federal Claims to determine whether these exercises of legislative power, *though substantively legitimate*, nonetheless required compensation to pass

constitutional muster.[48] This bedrock principle of the law of constitutional remedies goes back to the unanimous decision in *Hurley v. Kincaid*, 285 U.S. 95 (1932) (Brandeis, J.), where the Court held that the remedy for a taking *resulting from valid governmental action* is just compensation, not judicial second-guessing of governmental policies and decisions through disruptive injunctions.

In *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987), the Court (through Justice Scalia) examined California's plan to create an easement along the coast from Mexico to Oregon, and concluded:

> "The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it." (*Nollan*, 483 U.S. at 841-842.)[49]

And, of course, that concept is the underpinning for the Court's categorical rule that if regulation denies all economically beneficial or productive use of private land, it is a *per se* taking – no matter how beneficial it may be. (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015

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[48] That is why the Fifth Amendment's just compensation guarantee has been held self-executing. The availability of compensation validates and constitutionalizes the otherwise wrongful government action. (*City of Monterey v. Del Monte Dunes*, 526 U.S. 687 [1999]; *United States v. Clarke*, 445 U.S. 253, 257 [1980].)

[49] See also *Griggs v. Allegheney County*, 369 U.S. 84, 89-90 (1962) (Douglas, J.) [airport operator must pay for noise-impacted property beyond the ends of its runway].

[1992].)[50] That is why, under *Lucas*, a taking *always* occurs when economically productive use is prevented, "*without* case-specific inquiry into the public interest advanced in support of such a restraint." (*Lucas*, 505 U.S. at 1015; emphasis added.)[51]

Thus, for a taking to occur, it matters not whether the regulators acted in good or bad faith, or for good or bad reasons. What matters is the impact of their acts, not the purity *vel non* of their motives. Indeed, if their motives are benign, that only fortifies the need for compensation by confirming that the taking is indeed for a public use as required by the Just Compensation Clause of the Fifth Amendment. Put still another way, the exercise of the power to govern – whether by eminent domain or by far-reaching regulations that *de facto* deprive the owners of their right to make productive use of their land – is not a tort. Nor is it *per se* wrongful – unless the government refuses to pay the just compensation required by the Constitution. That TRPA may not *want* to pay for the impact of its regulations is irrelevant. That is, as this Court put it when TRPA was here four years ago, "simply one of the risks of regulatory pioneering, and the pioneer

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[50] See *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571, fn. 28 (Fed. Cir. 1994), in which the court noted with understatement: "In *Lucas*, the South Carolina Supreme Court had held that the State's purpose in protecting oceanfront ecology excused the State from liability for its regulatory imposition. The Supreme Court held that was not the correct criterion for takings jurisprudence."

[51] In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) this Court (through Justice Kennedy) reaffirmed its position by affirming an award of compensation notwithstanding that the city's purpose in rejecting development was environmental protection. See also last Term's decision in *Palazzolo v. Rhode Island*, ___ U.S. ___ (2001) in which the Court remanded for further consideration a case in which development had been rejected in order to protect coastal wetlands.

here is the agency, not [the landowner]." (*Suitum*, 520 U.S. at 742 [Souter, J.].)

D

TRPA's Conscious Decision To Prohibit The Use Of The Petitioners' Land Requires Compensation To Constitutionalize That Choice.

What the government did here was to bar all economically productive use of the subject residential lots, assertedly for the greater good of the community. Borrowing *Nollan*'s metaphor, TRPA decided to create a benefit for all Americans by severely restricting development around Lake Tahoe, but presented the bill for that public benefit to these landowners alone. Through the enactment of a series of rolling moratoria (now made permanent), TRPA has *de facto* conscripted these landowners as involuntary keepers of vacant land that they may not productively use. TRPA may have had the right to make that decision, but decisions have consequences. The consequence here is that the decision requires compensation to make it valid. Justice Holmes put it plainly for the Court nearly a century ago, in words that seem to have foreshadowed this litigation:

> "[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air in its domain. It has the last word as to whether its mountains shall be stripped of their forests and inhabitants shall breathe pure air. *It might have to pay individuals before it could utter that word*, but with it remains the final power." (*Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 [1907] [emphasis added].)

This Court echoed the same thought more recently:

> "[R]egulations that leave the owner of land without economically beneficial or productive options for its use – typically, as here, by requiring land to be left substantially in its natural state – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." (*Lucas*, 505 U.S. at 1018.)

Thus, when this Court analyzed the concept of temporary regulatory takings and compared them to direct condemnations (both temporary and permanent), it found no conceptual difference:

> "These cases reflect the fact that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." (*First English*, 482 U.S. at 318.)

The temporary regulatory taking in *First English* was the blood relative of the one at bench. It began as a "temporary time out," so that the County could consider what use of the land was in the best public interest after a flood had disclosed dangers in some of its uses, and then was replaced by a permanent ban on new construction (with limited exceptions not available to private citizens). (See 482 U.S. at 307 and 313, fn. 7.)

When *First English* is combined with *Lucas*, the result is clear except to those who insist that government should never have to pay for the impact of its regulations in any event. A respected national text (at least one of whose authors has repeatedly referred to himself as "a police power hawk," i.e., an ardent defender of those who wield the police power) concluded simply:

> "The Supreme Court's *Lucas* decision requires a holding that a per se taking has occurred when a moratorium denies a landowner all reasonable use of his land. . . . " (Daniel R. Mandelker, Jules B. Gerard & E. Thomas Sullivan, Federal Land Use Law § 2A.05[2][c], p. 2A-65 [rev. 2001].)

Other commentators agree:

"In the authors' opinion, the Supreme Court's categorical taking rule in *Lucas* should mandate compensation when moratoria result in the temporary denial of all economically productive or beneficial uses. . . . A moratorium should be considered a categorical taking under *Lucas* when it prohibits all development or the submission of development applications on a given parcel of property that currently has available no economically beneficial or productive uses." (Wendy U. Larsen & Marcella Larsen, *Moratoria as Takings Under* Lucas, 46 Land Use Law & Zoning Dig., no. 6, p. 3 at 6 [1994].)

"[I]n the residential context, a moratorium should be considered a categorical taking where property zoned residential has no existing habitable/saleable structures and is vacant." (Michael A. Zizka, et al., State & Local Government Land Use Liability § 4:4, p. 4-11 [rev. 2000].)

Whether the government chooses to condemn a passive easement over private land, or whether it reaches the same result through regulations that forbid the land's owners to make any use of it themselves, the result is the same and, unsurprisingly, it is governed by the same Constitutional doctrine. In short, the conscious legislative decision to freeze the use of land is the functional equivalent of a conscious legislative decision to acquire a property interest (of whatever duration the legislators believe necessary) by eminent domain. The constitutional imperative of compensation follows in either case.

E

At A Minimum, Compensation Is Due From The Time A Moratorium Has A Substantial Adverse Impact On Landowners.

Petitioners agree with the commentators quoted above that equitable considerations and the logic of *Lucas*

and *First English* mean that a moratorium that precludes, for whatever period of time the regulators wish, all economically productive use of private land is a *per se*, or categorical, taking.

The need for compensation is at least as great for those subject to moratoria as for those whose land is physically invaded. In a sense, the Court resolved that question in *First English* too, when it began its opinion thus:

> "In this case the California Court of Appeal held that a landowner who claims that his property has been 'taken' by a land-use regulation may not recover damages *for the time before it is finally determined that the regulation constitutes a 'taking' of his property.* We disagree, and conclude that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would *require compensation for that period.*" (*First English*, 482 U.S. at 306-307; emphasis added.)

In so holding, this Court reaffirmed that takings issues are viewed from the vantage point of the landowner because the purpose of the Bill of Rights is to protect citizens from an overreaching government. That is also why the Just Compensation Clause is treated as "self-executing." (*First English*, 482 U.S. at 315; *United States v. Clarke*, 445 U.S. 253, 257 [1980]; *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 [1999].) Although the government can control the ending date of a temporary taking (see *San Diego Gas*, 450 U.S. at 658), compensation is owed from the time of the adverse impact on the owner, which may be some time before the date of judgment. (*First English*, 482 U.S. at 318-321.)

In the case at bench, the fact that TRPA was engaged in a scheme seeking to preserve a unique American environmental resource does not allow it to achieve that goal at the sole expense of these landowners. As the Court of

Appeals for the Federal Circuit put it (in the context of wetlands preservation):

> "What is not at issue is whether the Government can lawfully prevent a property owner from filling or otherwise injuring or destroying vital wetlands. . . .
>
> "The question at issue here is, when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner, or is it to be shared by the community at large." (*Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1175 [Fed Cir. 1994].)

The trial court concluded that TRPA had so much to do, it was reasonable – from TRPA's standpoint – to enact moratoria, and that TRPA could not reasonably have completed its tasks more rapidly. (Pet. App., pp. 114-115.) But that, as this and other courts have repeatedly explained, cannot immunize TRPA from its constitutional duty to compensate when its proper governmental actions conscript private property into public service. Nor is it relevant to whether it was reasonable *from the landowners' standpoint*. It is all well and good to conclude that the government has such an awesome job to do it will take years to accomplish; however, it is something quite different to conclude that the cost of that job will fall only on selected individuals, rather than the public as a whole which gets to enjoy the benefits of the regulation.

In a case like this, where the government enacts a "moratorium" that precludes all economically productive use (as the trial court found [Pet. App., p. 99], and the Ninth Circuit affirmed [Pet. App., p. 40, fn. 30]), the right to use the land is taken *ab initio*. The moratoria at bench lasted from 1981 through 1984 (if one uses the salami slicing analysis of the courts below) or until the present and into the future (if one uses reality as a guidepost), a significant period of time under any analysis. (See *First English*, 482 U.S. at 322, terming the similar temporary moratorium there "considerable.")

The situation could conceivably be different under other circumstances where, for example, the time period is quite short, and its imminent ending date known from the outset so that landowners can plan to deal with it and try to minimize its impact. Under a standard that requires substantial impact, such brief "time outs" might not be takings. But that is not this case. As the trial judge put it:

> "Enacting an unconstitutional ordinance with no plans to end it is different than simply putting a hold on development for a few months while trying to formulate a plan under which development will be possible." (Pet. App., pp. 111-112.)

Under either standard proposed in this brief, i.e., a bright line and doctrinally clear *per se* rule or a substantial impact rule, the trial court properly decided to award compensation to these landowners. That ruling should be reinstated.

CONCLUSION

This Court asked:

> "Whether the Court of Appeals properly determined that a *temporary* moratorium on land development does *not* constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?" (JA 192; emphasis added.)

The answer, plainly, is that it did not. The Court of Appeals failed to understand or heed this Court's decision in *First English*. The Court of Appeals failed to understand the totality of the injury TRPA inflicted on these landowners. And the Court of Appeals misunderstood its task when it sought to protect the government at the expense of individuals.

This Court has consistently held that it is the Fifth Amendment charge of the judiciary to guard property owners against confiscation engineered not only by crude seizures, but by governmental "exercise[s] in cleverness and imagination" as well (*Nollan v. California Coastal Commn.*, 483 U.S. 825, 841 [1987]), with the clear understanding that such protection would "lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations" (*First English*, 482 U.S. at 321). Placing limits on the government is what the Bill of Rights is all about.

Landowners, no less than other citizens, are entitled to the safeguards of the Bill of Rights. (*Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].) "After all, if a policeman must know the Constitution, then why not a planner?" (*San Diego Gas*, 450 U.S. at 661, fn. 26; Brennan, J., dissenting.) Why not, indeed.

The Petitioners pray that the Ninth Circuit's decision be reversed so that they may finally recover compensation for the property taken from them two decades ago for the period of time this Court determines to be the period of actionable taking.

Respectfully submitted,

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